# No. 15,690

# United States Court of Appeals

## For the Ninth Circuit

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SUNSET-STERNAU FOOD CO.,
a corporation,
*Appellant,*

vs.

AMERICAN ALMOND PRODUCTS CO., INC.,
a corporation,
*Appellee.*

## APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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### PRELIMINARY OBSERVATIONS.

An examination of appellee's reply brief reveals a stress upon certain evidence favorable to its case and a complete disregard of the evidence unfavorable to it.

Upon appellee rested the burden of proving its case.

Yet, in its brief it failed to comment upon the evidence needed to support its contentions and the findings in the following respects:

1. That it rejected appellant's formal contract and the "note" (P. Ex. 9, 10). Yet this is evidence produced by appellee and they are bound by it.

2. That both parties understood a formal contract was to be signed; that Mr. Kaplan so understood such transaction (T. p. 163, 4).

3. That a trade custom attached to and became part of the "note" dated September 1, 1955. Their own evidence refutes such attachment (P. Ex. 10). They pass over the rejection of the formal contract of appellant and their demand that the "5% clause" be included in the "note" by stating, in their brief, p. 10, "Mr. Kaplan stated that he would *prefer* that it be expressly stipulated . . ."

4. That there is not one iota of evidence in the record to sustain that part of Finding No. 4, that Prince Keeler was the "agent" of appellant—and of appellee. They do not comment upon the admission of lack of such authority by Prince Keeler in their own exhibits (P. Ex. 10, 16).

5. More important, however, Appellee does not comment upon or try to distinguish the authorities cited by appellant in support of its position.

Relying, therefore, upon our previous statement of fact, argument and citation of authority, appellant feels it should analyze the authorities cited by appellee.

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**ANALYSIS OF AUTHORITIES CITED BY APPELLEE.**

1. On page 20 of its brief a statement is taken from 37 *C.J.* 5, p. 705, that a broker who negotiates a sale is an agent of both sides for the purpose of making and signing a memorandum of the contract of sale.

Obviously, this is cited to sustain the claim that Prince Keeler was the agent of appellant and bound appellant by the "note" of September 1, 1955 (P. Ex. 8).

This case was tried upon the basis California law applied.

Sections 2309 and 1724 of the Civil Code and 1973 (a) of the Code of Civil Procedure of California require such authority to be in writing. There is no evidence in the record that such authority was ever given.

2. *Thomas Henderson & Co. Inc. v. Baron,* 164 N.Y. Supp. 697 (1917). In this case the Appellate Court ordered a new trial of the case on the basis that certain evidence was excluded which would have attempted to show the broker's authority to bind the defendant. The Court stated by way of dicta in this case where the broker mailed out a "broker's note" in connection with this sale that it constituted a valid contract of sale. Significantly, however, there was no Statute of Frauds in existence in that state as there is in California. There was no judgment on the merits as such in that controversy.

3. *Georgia Peanut Co. v. Famo Products Co.,* 96 Fed. (2d) 440. In this case the Court recognized that the Statute of Frauds governs insofar as the ability of an agent to bind a principal and that this authority must be in writing. The question of estoppel to set up the Statute of Frauds as a defense was discussed. In light of the evidence produced it was rejected. We feel that the same reasoning should

apply in the instant case in view of appellant's letter of September 21 (P. Ex. 11).

4. *Kelley-Clarke Company v. Leslie,* 61 Cal. App. 559. Appellant contends that case is not in point. In that case the evidence was complete that an agency was in existence binding upon the plaintiff and that the terms of the contract were complete and expressed in writing. It differs from the instant case in that Prince Keeler has been demonstrated to be only a middleman by its own admissions and the contract terms, if such they be, expressed in the "note" of September 1, 1955, is incomplete (1) because appellee insisted that there be written into that "note contract" the five percent clause, and (2) the terms insisted upon in appellant's formal contract which appellee refused to sign must likewise be construed as part of the contract which appellee understood it would be bound by when and if signed.

Moreover, Prince Keeler, in the instant case, at all times recognized they were not the agent of appellant and could not bind appellant (P. Ex. 10, 16).

5. *Franklin Sugar Refining Co. v. Egerton, et al.,* 288 Fed. 698 (1923). In this case the terms of the contract were complete in the writings as to price, quality and delivery which was elastic as to the seller. The Court held that the defense's contention that the contract was uncertain as to price and quality was not true; that the letters between the parties interpreted in the language of the particular trade, definitely fixed the price and quality *and that defendant fully under-*

*stood the trade terms used.* Concerning the defense of the Statute of Frauds the Court held that all terms of the contract were in writing in various letters exchanged between the parties—not through a middleman.

This case differs from the instant case in that it is fully established that appellant did not understand, in this new business, the trade terms, that appellee did not rely upon trade and custom insofar as the five percent clause is concerned and that appellant could not meet the condition of the five percent clause and that appellee did not waive it after having demanded that it be made a part of the written contract to be executed between the parties to this action.

6. *Franklin Sugar Refining Co. v. Muller,* 12 Fed. (2d) 885. In this case the Court invoked the parole evidence rule to use trade custom and usage to interpret the meaning of the words of the contract—*not to add a term or condition to the contract.* The Court said:

> "In the present case we are not writing into the contract something that is not in it, but we are finding the meaning of the terms used in the contract, which presumably were placed there by the parties because they meant something; and to each of them we are bound to give force and effect under the familiar rules of construction" (p. 887, par. 2).

The Court held and went on to say that both plaintiff and defendant "well knew, before and at the time of the making of said contract, the trade usage and custom."

This case was on demurrer of the defendant which had been sustained by the Trial Court; the Appellate Court reversed the ruling on the demurrer without deciding the merits of the controversy.

7. *Howell v. Witman-Schwartz Corporation,* 7 Fed. (2d) 513. In this case we have essentially the same situation that existed in the two previously cited cases. All terms of the contract were agreed upon in the exchange of letters between the parties though no formal contract was signed.

8. *Beckwith v. Talbot,* 95 U.S. 289 (24 L.Ed. 496). Again, in this case the terms of the contract were certain, agreed to by all parties in letters between the parties and the contract enforced.

9. *Moore v. Day,* 123 Cal. App. (2d) 134 (1954). This case discloses a factual situation far different than in the instant case:

> "The Court there found Gilligan, *a broker, was in fact the agent of appellant,* that the broker, for many years had purchased beans for appellant, on a commission basis, the custom being for appellant to advise broker how much he would pay for a certain quantity of beans and if terms were satisfactory, Gilligan, the broker would obtain a written contract of sale and purchase. Respondents were fully familiar with the practice of executing a written contract covering transactions entered into with a broker through his agent."

The Court also found in this case that buyer continually told seller he would accept the beans bought and then the price dropped—but it also found that

the terms of the contract were complete and both parties in accord and both parties capable of completing the contract per its terms.

This is not true in the instant case—where appellant was not able to complete the contract at any time under the five percent clause—nor was this clause accepted by appellant or waived by appellee—nor were terms of appellant's contract accepted in other respects by appellee.

Appellee attempts to prove the existence of a contract by stating that appellant retained the "note" of Prince Keeler without objection (Appellee Brief, p. 21).

This statement is a fallacy and appellee knows it to be so. This "note" was retained as a "memo" in the ordinary course of business, such as a letter or telegram, and appellant responded to it by sending Prince Keeler its formal contract which appellee refused to sign unless there was written into it the five percent clause.

Appellee further states that "the undisputed testimony is that it is a usual practice for a broker's memo to be the sole evidence of a contract" (Appellee Brief, p. 21).

This is another misstatement. Mr. Engell, in his testimony stated:

> "Q. Mr. O'Connor. Would you mind showing me that contract you referred to, Mr. Engell?
> A. *This is the memorandum of sale from which the contract is written up*" (R. 244).

10. *Miller v. Germain Seed Etc. Co.,* 193 Cal. 62, 222 P. 817. In this case appellee quotes language out of the context.

This case involved a purchase of seed by plaintiff from defendant. The seed turned out to be different from the specific type requested. Plaintiff sued for damages for breach of warranty. The Court held that the trial Court should have given an instruction to the jury, in the light of evidence produced by defendant, to the effect that in the sale of seed there is a general and universal custom and usage of the trade that seed is not sold on warranty.

The Court did say, however, just prior to plaintiff quotation, p. 69:

> "To be regarded as part of a contract, however, the usage or custom must have both of the foregoing elements (i.e. custom not inconsistent with the contract and of such general and universal application that a person is conclusively bound by it).
>
> (1) It must be actually or constructively known and
>
> (2) It must be consistent with the contract."

In this case the Court held that plaintiff could not impose upon defendant a contract of warranty it never intended to make because of ignorance of a custom.

However, in the present case we do not have a general or universal custom; we do not have knowledge of the custom by appellant, known to appellee to be so, *but we do have total nonreliance of appellee upon*

*such custom by his request it be added to the contract and inability of appellant to deliver under such clause expressed and transmitted to appellee.*

11. *Pastorine v. Green Bros.,* 90 Cal. App. (2d) 841, 204 P. (2d) 386. In this case the question involved *interpretation* of contract terms through usage and custom, not the attempt to add terms to a contract. Also, familiarity with custom and usage through long previous study of the particular industry (fishing industry) was concluded by the Court.

*Significantly, appellee does not reply to the contention of appellant that appellee himself did not depend, or choose to depend on the "custom" as adding an unwritten condition to the alleged "note" contract, but demanded that such "custom" be written into the "note" and the formal contract of appellant. Appellee blithely skips past this contention by stating merely ". . . Mr. Kaplan expressed a desire that it be added to the formal contract . . ."*

*Yet, because of Mr. Kaplan's demand, he refused to sign the formal contract of appellant—and appellant refused to alter it or give authority to Prince Keeler to insert it in the alleged "note" contract of September 1, 1955.*

12. *Gibson v. De La Salle Institute,* 66 Cal. App. (2d) 609, 152 P. (2d) 774. This case, cited by plaintiff, is not in point.

The Trial Court had granted a motion for summary judgment in favor of defendant, holding that the telegrams between the parties did not disclose a complete

contract, that it was within the Statute of Frauds and that approval of samples, following the exchange of telegrams, was indicated.

The Appellate Court held that the use of the summary judgment proceedings was a drastic remedy and not to be invoked where there was any real issue of fact before the Court.

Also, that when parties agree upon complete terms of a contract, a formal written contract may, or may not, be necessary, but that the Court should take evidence to determine this fact which it could not do in such a summary proceeding.

Also, that there was a serious question re samples being sent and approved as a condition precedent to the contract; that this was a matter in dispute and could only be determined by evidence being taken to determine the intention of the parties.

Thus the issues there were far different than those of the instant case, the main point decided being that when there are disputed issues the Appellate Court says the summary judgment remedy should not be invoked but that a full trial be given on those issues.

13. *Thompson v. Schurman,* 65 Cal. App. (2d) 432, 150 P. (2d) 509. This case is not in point. A far different factual situation was involved. This was an appeal from an order granting a new trial. Action was brought to recover money paid upon an oral contract that the parties considered binding. The contract was within the Statute of Frauds, involving the purchase and sale of real estate. However, the Statute

of Frauds was not pleaded. Basis of the action was fraud and misrepresentation and the trial Court found against such charge.

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APPELLEE'S THEORY OF THE CASE IS NOT SUSTAINED BY THE EVIDENCE OR LAW.

Appellee's theory of liability has rested upon the following:

1. That Prince Keeler was the agent of appellant and bound appellant by its "note" contract. It is respectfully submitted that this was not true; that appellant's contentions, detailed in its opening brief, are correct. Appellee has not answered those contentions.

2. That a trade custom re the "5% clause", unwritten, attached itself to the alleged "note" contract to make it complete.

It is respectfully submitted that the evidence and authorities set out in appellant's opening brief are correct and that, in this case, such trade custom did not attach, as an unwritten condition, to complete the "note" contract. Further, appellee has not successfully answered the facts and authorities heretofore submitted by appellant.

3. That there was a ratification by appellant of the "note" contract.

It is respectfully urged that ratification can only be operative when all the terms and conditions of the agreement are definite and certain and agreed to by all parties. Such is not the case here.

The "5% clause" was not agreed to by appellant. Nor were the terms of appellant's formal contract (P. Ex. 9) agreed to by appellee. Again, appellee did not agree to the "note" contract in the absence of incorporation therein of the "5% clause".

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**THE PARTIES CONTEMPLATED THE EXECUTION OF A FORMAL WRITTEN CONTRACT BETWEEN THEM.**

It is respectfully urged that the evidence and authorities previously submitted in support of this proposition by appellant have not been met by appellee.

A mere reading of appellant's formal written contract, (P. Ex. 9) discloses terms and conditions not mentioned in the negotiations or the alleged "note" contract, to say nothing of the failure of inclusion of the "5% clause".

In *Fly v. Cline,* 49 Cal. App. 414 (193 P. 615), the Court states:

> "It also is elementary law that, unless the agreement to execute the future contract be definite and certain upon all the subjects to be embraced, so that nothing is left for future negotiation, it is nugatory."

122 *American Law Reports,* p. 1251, *et seq.;*
*Kessinger v. Organic Fertilizers, Inc.,* 151 Cal. App. (2d) 884, 312 P. (2d) 345.

## CONCLUSION.

Appellant respectfully submits the judgment should be reversed.

Dated, San Francisco, California,
June 3, 1958.

Respectfully submitted,
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*Attorney for Appellant.*